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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 447

HYMAN KATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the circuit court of appeals (R. 79) is reported at 161 F. 2d 869.

JURISDICTION

The judgment of the circuit court of appeals was entered April 7, 1947 (R. 79), and a petition for rehearing was denied October 21, 1947 (R. 100). The petition for a writ of certiorari was filed November 20, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judical Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the circuit court of appeals had jurisdiction to consider the appeal.

2. Whether the trial court abused its discretion in refusing to permit petitioner to withdraw his plea of guilty.

RULES INVOLVED

Rule 10 of the Federal Rules of Criminal Procedure provides as follows:

> Rule 10. Arraignment. Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead.

Rule 11 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> Rule 11. Pleas. A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. * * *

Rule 32 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> Rule 32. Sentence and Judgment.
>
> * * * * *

> (d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

On March 1, 1946, an indictment was filed in the District Court for the Eastern District of Michigan charging petitioner and his brother, Norman Albert King, with a violation of 18 U. S. C. 409 by receiving 66 Firestone tires, which they knew had been stolen from an interstate shipment (R. 4, 6). On April 3, 1946, petitioner, who was represented by an attorney, was arraigned and pleaded guilty. Sentence was deferred and the case referred to the probation officer. The indictment was dismissed as to King. (R. 4, 8, 9–10). On July 17, 1946, petitioner filed a motion to vacate his plea of guilty on the ground that he had not understood the nature of the accusation at the time of arraignment (R. 5, 35–39). On July 22, 1946, after a full hearing in the district court, the motion was denied, and petitioner was then sentenced to imprisonment for 10 months (R. 5, 49, 63, 64). On July 23, 1946, petitioner noted an appeal "from the order of the District Court denying his motion to vacate and set aside

a plea of guilty" (R. 5, 65). The order was affirmed on appeal (R. 79), and the present petition seeks a review of that decision.

The evidence upon which the district court determined that petitioner had entered his plea of guilty with full knowledge of the nature of the accusation may be summarized as follows:

Petitioner, who has been an automobile salesman since 1928, and is manager and part owner of a used car lot (R. 17, 18–19, 60–61), was interviewed by an F. B. I. agent late in October 1946, with respect to some tires in his possession which were discovered to have been stolen from an interstate shipment (R. 20–22). Petitioner went immediately to an attorney, May, to tell him the story and ask advice, and when petitioner and his brother were arrested several days later they retained May as counsel (R. 22, 53).

Upon arraignment five months later petitioner, appearing with May as counsel, waived the reading of the indictment and pleaded guilty (R. 4, 8). He also signed an acknowledgment to the effect that he had received a copy of the indictment prior to pleading and had read and understood it (R. 7). The transcript of the proceedings is as follows (R. 9–10):

> Appearances: Mr. Thomas P. Thornton, Assistant U. S. District Attorney, in behalf of the Government; Mr. Alfred May, in behalf of the defendant.

Mr. THORNTON. I have a plea in the Katz case. Let the record show that I am handing the defendant a copy of the indictment.

The COURT. All right. Give him the receipt.

Mr. MAY. In this case, if the court please, this defendant, Katz, desires to enter a plea of guilty at this time.

The COURT. Have him sign that receipt for the indictment, Mr. Katz, did you hear what Mr. May said?

The DEFENDANT. Yes, sir.

The COURT. Did anybody make any promise to you to get you to plead guilty?

The DEFENDANT. No, sir.

The COURT. Anybody make any threats to cause you to plead guilty?

The DEFENDANT. No, sir.

The COURT. You have talked with Mr. May about this case, have you?

The DEFENDANT. Yes, sir.

The COURT. You are pleading guilty because you know you are guilty, is that correct?

The DEFENDANT. Yes, sir.

The COURT. All right. The plea will be accepted and the matter referred to the Probation Department, for investigation and report. I can't give you the sentence date at this time, Mr. May, because there is another defendant in the same case here. What about the bond, Mr. May? Thornton?

Mr. THORNTON. $2500. We recommend the bond be continued.

The COURT. All right. The bond may be continued. Mr. May, will you take him to the Probation Department to make another appointment.

Mr. THORNTON. There is another defendant in this case, Albert King. As to Albert King, the government moves to dismiss the indictment.

The COURT. All right. The motion to dismiss as to King may be granted. Well, then, Mr. May, I can give you a sentence date. Any Monday all right with you?

Mr. MAY. I think, your Honor, for your own information, the Probation Department may want to talk to the other defendant who was dismissed in the case, and he is in Cleveland, so maybe we better wait for them to conclude their investigation and they will notify us.

The COURT. All right.

On May 6, 1946, petitioner appeared in court for sentence. His attorney stated that "after going over all the facts in the case with him, I decided that it was a violation in the case and that he was the responsible party, and talked it over with him and he then plead guilty."[1] The attorney's request for probation was denied, the court indicated that the sentence would be ten

[1] There is some evidence that petitioner assumed full responsibility in order to have the indictment dismissed as to his brother, who has heart trouble (R. 25, 52, 53, 54).

months, and a date was set for formal imposition of sentence. (R. 4, 11.)

One week later, on May 13, 1946, petitioner appeared with a new attorney, Porritt, and asked leave to file a motion to vacate the plea of guilty, alleging that he was innocent and did not understand the charge at the time of arraignment (R. 4, 12–15). After a hearing at which petitioner testified at great length (R. 16–33), the proceedings were adjourned in order to give petitioner an opportunity to have May testify that he had not fully explained the charge prior to arraignment (R. 4, 55). Immediately after the hearing there was a conference between petitioner, May and Porritt, at which May advised that it would be best to withdraw the motion "because he had reasons to believe the Judge would deny it" (R. 56). Two days later Porritt, with petitioner's consent, withdrew the motion (R. 5, 42, 56).

After imposition of sentence had been deferred several times during the next two months, a new attorney, Louisell, filed a second motion to vacate the plea based upon the same grounds, and alleging further that petitioner had not read the indictment prior to pleading, nor had he consulted with counsel as to the indictment or consented to plead guilty (R. 5, 35–39). At the hearing no new evidence was admitted. Attorney Louisell stated that the only new proof he would like to have in the record was an affidavit, dated June 14, 1946,

prepared by petitioner himself. But when the court noted that the affidavit questioned the competency and honesty of the advice given by May and Porritt, and stated that if proof was to be received on that issue May and Porritt should be present, the affidavit was never received in evidence, although it now appears in the record.[2] (R. 40–49, 70–75.) The motion was denied and sentence was formally imposed (R. 5, 49).

Throughout the proceedings petitioner's story of the acquisition of the tires has varied considerably. He told the F. B. I. agent who originally interviewed him that he had purchased four tires from a peddler (R. 21). When the case was referred to the probation officer after he had pleaded guilty he stated that his brother had bought the tires from Giordano (R. 58). Some time later he told an assistant district attorney that he had stored seventeen of the tires in a shed and that he did not know what became of thirteen of them (R. 24–25). At the hearing on the first motion he testified that he heard his brother buy the tires from Giordano, that he gave his brother several hundred dollars in cash as part of the payment, and that he had given the seventeen tires for safekeeping to an acquaintance (R. 17, 19, 27, 32). In the affidavit of June 14, 1946, he ad-

[2] It will be noted that petitioner places great reliance on this affidavit throughout the brief in support of the petition for certiorari (Pet. 2, 3, 6–8, 19–20, 22–23, 32–33).

mitted that his brother had bought sixty tires, and claimed that the acquaintance who took charge of the seventeen had sold thirteen without permission (R. 51, 55).

Petitioner's explanation of his plea, as stated in his affidavit of June 14, 1946, is that he did not know the tires were stolen until so informed by the officers, and that he did not understand that he was charged with guilty knowledge; that he did not see May from the time of their first meeting in November until the morning of the arraignment in April, and that they had never discussed a plea to the indictment; that he had not read the indictment and did not consent to the plea; and that, although May told him afterward that he would get probation or a suspended sentence at worst, he requested that the plea be changed (R. 50–56).

ARGUMENT

1. Petitioner has not appealed from the judgment sentencing him to imprisonment. He specifically appealed only from the order of July 22, 1946, denying his motion to vacate the plea of guilty (*supra*, pp. 3–4). This order did not "subject the defendant to any form of judicial control," and does not meet the test prescribed by this Court for determination of the finality of orders in criminal cases. *Korematsu* v. *United States*, 319 U. S. 432, 434. Such orders have

been specifically held to be interlocutory and non-appealable. *Farrington* v. *King,* 128 F. 2d 785, 787 (C. C. A. 8); *People* v. *Dabner,* 153 Cal. 398, 95 P. 880; *People* v. *Shaffer,* 130 Cal. App. 749, 20 P. 2d 345; *People* v. *Price,* 51 Cal. App. 2d 716, 125 P. 2d 529; *State* v. *McDowall,* 197 Wash. 323, 85 P. 2d 660; see also *United States* v. *Knight,* 162 F. 2d 809 (C. C. A. 3). It would appear, therefore, that the circuit court of appeals had no jurisdiction to consider the appeal.

2. But even if a proper appeal had been noted from the final judgment sentencing petitioner to imprisonment, we think the petition for certiorari presents no question which merits review by this Court. The nub of petitioner's argument is that he did not understand the nature of the accusation at the time af arraignment, and consequently that the trial court abused its discretion in not permitting him to withdraw his plea of guilty[3] (Pet. 14–15; Br. 12–13).

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[3] Petitioner concedes by implication that permission to withdraw the plea is discretionary with the trial court (Br. 13, 25, 27, 29–33). This has been consistently the position of the federal courts. *Kercheval* v. *United States,* 274 U. S. 220, 224; *United States* v. *Mignogna,* 157 F. 2d 839 (C. C. A. 2), certiorari denied, 330 U. S. 830; *Rosensweig* v. *United States,* 144 F. 2d 30 (C. C. A. 9), certiorari denied, 323 U. S. 764; *United States* v. *Fox,* 130 F. 2d 56 (C. C. A. 3), certiorari denied *Fox* v. *United States,* 317 U. S. 666; *United States* v. *Denniston,* 89 F. 2d 696, 698 (C. C. A. 2), certiorari denied, 301 U. S. 709; *Rachel* v. *United States,* 61 F. 2d 360 (C. C. A. 8); *Fogus* v. *United*

The burden rested upon petitioner to show cause why he should be permitted to change his plea, *Bergen* v. *United States,* 145 F. 2d 181, 187 (C. C. A. 8), and we think there can be no doubt that the evidence amply justified the court's refusal. That evidence shows that petitioner had had long experience in the automobile business; that he consulted an attorney as soon as he realized that he was in trouble, and that he was advised to plead guilty; that he appeared with counsel at the arraignment,[4] five months later, and stated that he pleaded guilty because he knew he was guilty; that he had read and understood the indictment; and that he did not insist on withdrawing his plea until he realized that he was not going to be put on probation. Perhaps the strongest point against petitioner is the fact that he never availed himself of the opportunity to have May, who he claimed had not made him fully aware of the nature of the accusation, present his version to the court. At the adjournment of the hearing on the first motion to vacate the plea, the judge advised petitioner to have

States, 34 F. 2d 97 (C. C. A. 4); *Gleckman* v. *United States*, 16 F. 2d 670, 673 (C. C. A. 8); *Camarota* v. *United States*, 2 F. 2d 650, 651 (C. C. A. 3). The notes appended by the Advisory Comimttee to Rule 32, Federal Rules of Criminal Procedure, show that there was no intent to modify this existing practice.

[4] In this the case is clearly distinguishable from *Von Moltke* v. *Gillies*, No. 73, this Term, now pending before the Court.

May appear in court two days later; but after a conference between May, Porritt and petitioner, at which May said that he had reason to believe the motion would be denied, it was withdrawn (*supra,* p. 7). Again, at the hearing on the second motion no move was made to obtain the testimony of May and Porritt, despite repeated suggestions by the court (*supra,* p. 8). We think the conclusion is obvious that May's story would have been unfavorable to petitioner. In view of this evidence and in view of petitioner's unreliability as a witness (*supra,* pp. 8–9), there was nothing to require the court to allow the plea to be withdrawn.

Petitioner contends that the arraignment was defective in that there was neither a reading of the indictment nor a statement of its substance, as prescribed by Rule 10 of the Federal Rules of Criminal Procedure, and in that the court did not first determine, prior to accepting his plea, whether he understood the charge, as prescribed by Rule 11 (Pet. 15; Br. 12, 14–19, 34, 35). The simple answer to the first point is that a reading of the indictment was waived.[8] We also think

[8] This appears specifically on the docket and in the court's order (**R.** 4, 8). It also appears by implication from the transcript, for petitioner's attorney announced the plea of guilty after petitioner had been handed a copy of the indictment, without waiting for the court to read it or state its substance (*supra*, p. 5).

As to waiver of arraignment, see *Garland* v. *Washington*, 232 U. S. 642; *Rulovitch* v. *United States*, 286 Fed. 315 (C. C. A. 3), certiorari denied, 261 U. S. 622; *State* v. *O'Toole*,

that the court fulfilled the requirements of Rule 11. In the court's presence petitioner was handed a copy of the indictment. Whether he then and there read it does not appear, but he did, in the court's presence and before his plea was accepted, sign an acknowledgment that he had read it and understood its contents. The court then ascertained whether the plea was voluntary by asking petitioner whether any threats or promises had been made to him. Finally, the court asked whether petitioner had talked the case over with May and whether his plea was the result of knowledge that he was guilty. Only then did the court accept the plea. The indictment clearly charged that petitioner had received the tires "knowing all the aforesaid tires to have been stolen" (R. 6); May's professional reputation for competence and honesty is excellent (R. 41–42); and petitioner is an experienced business man of normal mentality (R. 60–61). Under the circumstances, we think it was unnecessary for the court to take any further steps to determine that petitioner understood the nature of the charge.[6]

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115 N. J. L. 205, 178 A. 780, certiorari denied, 296 U. S. 613. The new rules of criminal procedure were not intended to make any change in this state of the law. See the notes of the Advisory Committee to Rule 10, and see the proceedings of the New York University School of Law Institute, pp. 162, 187, 214.

[6] Petitioner relies strongly (Pet 15; Br. 23–26, 35) upon *Bergen* v. *United States*, 145 F. 2d 181 (C. C. A. 8). We submit that that case is readily distinguishable in that the

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1947.

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defendant was without counsel at the time of arraignment, and he also filed with the court, simultaneously with his plea of guilty, a lengthy statement the effect of which was to deny his guilt. It is true that the present petitioner, within two weeks *after* arraignment, stated to the probation officer that he did not know the tires were stolen (R. 58). But the effect of this statement is outweighed by the fact that when he returned to court for sentence on May 6, 1946, he again, without protest, heard May state that he was the responsible party, and that they had talked it over and decided upon a plea of guilty (R. 11).

Petitioner also insists that he never had advice of counsel as to his plea, because the record shows that May never discussed the indictment with him (Br. 12, 13, 19–21, 22–23). However, even if there was no discussion of the case after the formal finding of the indictment, which we are not forced b ythe record to concede, it is clear that May and petitioner discussed the facts which led to the indictment.

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